Wan Sagar bin Wan Embong v Harun bin Taib & Ors

FEDERAL COURT — CIVIL APPEAL N0 01(F)–2 OF 2008(T)
ALAUDDIN CJ (MALAYA), ARIFIN ZAKARIA AND ZULKEFLI FCJJ
10 JULY 2008

Election — Petition — Application for declaration that elections were null and void — Whether decision of election judge relates to interlocutory matter and therefore not appealable — Whether there was a 'trial of an election petition' for purposes of s 36(1) of the Election Offences Act 1954 — Election Offences Act 1954 ss 33(4), 36(1), 36A(1)

Words and Phrases — Interlocutory — Interlocutory decree, judgment and order — Meaning of interlocutory matter in context of s 33(4) of the Election Offences Act 1954

Words and Phrases — 'trial of an election petition' — Meaning of — Within context of s 36(1) of the Election Offences Act 1954

The appellant in this case had stood as a candidate for Barisan Nasional in the general election held on 8 March 2008 and lost to the respondent, a Parti Islam Se Malaysia candidate, by a majority of 406 votes. Dissatisfied with the election results he filed an election petition at the High Court seeking, inter alia, a declaration that the election be declared invalid and void and for a declaration that the respondent was not duly elected or ought not to have been returned at the election. At the hearing of the petition the respondent raised five grounds as preliminary objection. After hearing the submissions the election judge upheld the preliminary objection and ordered that the petition be struck out with costs. This was the appellant's appeal against that decision pursuant to s 36A of the Election Offences Act 1954 ('the Act'). At the hearing of the appeal the respondent raised a preliminary objection against this appeal on the grounds that since the decision appealed against in this case related to an interlocutory matter it was final and not appealable. The said objection was based primarily in reliance on s 33(4) of the Act and the decision of this court in *Gan Joon Zin v Fong Kui Lun & Ors* [2004] 4 CLJ 729 (*Gan*'s case). The principal issue that had to be determined in this case was whether the decision of the election judge to strike out the petition, based on the preliminary objection, was appealable. The appellant contended that the court ought to reconsider the correctness of *Gan*'s case, which related to

a striking out order made by the election judge, because it could not have been the intention of the Parliament to shut out the petitioner from appealing against such an order. The appellant further submitted that the preliminary objection in this case could not be regarded as a mere interlocutory matter as it disposed of the petition and for that reason he contended that it was not caught by the bar imposed by s 33(4) of the Act. The respondent on the other hand contended that it is trite law that an appeal is a creature of statute and that the provisions of the Act must be strictly construed. Therefore, if the Act did not provide for the right to appeal to the Federal Court, as in the present case, it was not for this court to do otherwise no matter how grave the consequence may be.

Held, dismissing the preliminary objection with costs and holding that the petitioner had right of appeal under s 36A of the Act:

(1) The amendment to s 33(4) of the Act, which came into force on 2 May 1986, put an end to the uncertainty that existed as to whether a decision on an interlocutory matter was appealable or not. The amended s 33(4) of the Act provides that a decision of the court in regard to interlocutory matters in connection with an election petition shall be final. Therefore, insofar as decisions on interlocutory matters are concerned it is settled that there is no right of appeal (see para 9).

(2) Based on the definition of the term interlocutory order or judgment and based on the tests applied by the courts in determining whether an order or judgment is interlocutory or not it appeared that in the present case the order by the election judge could not be regarded as an interlocutory order as it disposed of the petition (see paras 17–18).

(3) However, in the case of a decision by the election judge under s 36 of the Act there was no appeal allowed until the amendment that came into effect on 16 January 2003 in the form of s 36A. The right of appeal as conferred by s 36A(1) of the Act is limited to the determination of an election judge under s 36 of the Act. As s 36(1) of the Act requires the decision by the election judge to be made at the conclusion of the trial of an election petition, and since the petition in this case was struck out based on the preliminary objection, there arose the issue as to whether there was a trial of an election petition in the instant case. The words 'trial of an election petition' ought to be given a broad meaning, ie, to include trial of any issue relating to the petition, whether an issue by way of a preliminary objection or not, and once having determined that issue the election judge is not bound to proceed to the remaining issue or issues. Therefore, in the present case the election judge had allowed the preliminary objection raised by the respondent at the outset of the hearing and based on that had struck off the petition but in so

doing he had tried the issue before him. Thus, there was a trial of an election petition for the purposes of s 36(1) of the Act and by ordering that the petition be struck off the election judge had brought that election petition to its conclusion (see paras 10–12 & 28).

(4) Furthermore, s 36A(1) itself provides that a petitioner or a candidate whose return or election is complained of may appeal against the determination of an election judge to the Federal Court. Therefore, clearly the order by the election judge striking out the petition was a determination within the meaning of the said section and hence it was appealable (see para 29).

(5) The conclusion reached by this court in *Gan*'s case could lead to an anomalous result, in that, when a judge strikes out a petition without a trial, without hearing evidence, but purely on a procedural defect, the order is not appealable but when a case is decided after what is referred to as a 'full trial', then it is appealable. As this could not have been the intention of the Legislature, the court was constrained to depart from its decision in that case (see para 30).

[Bahasa Malaysia summary

Perayu dalam kes ini telah bertanding sebagai calon untuk Barisan Nasional dalam pilihan raya umum yang diadakan pada 8 Mac 2008 dan telah kalah kepada responden, calon Parti Islam Se Malaysia, dengan majoriti 406 undian. Berasa tidak puas hati dengan keputusan pilihan raya, beliau telah memfailkan petisyen pilihan raya di Mahkamah Tinggi memohon, antara lain, satu deklarasi bahawa pilihan raya tersebut diisytiharkan tidak sah dan terbatal dan untuk satu deklarasi bahawa responden tidak dipilih seperti yang sepatutnya atau patut tidak ada hak untuk dilapor dipilih di pilihan raya itu. Semasa perbicaraan petisyen, responden telah menimbulkan lima alasan-alasan sebagai bantahan awal. Selepas mendengar penghujahan-penghujahan hakim pilihan raya mengesahkan bantahan awal itu dan memerintahkan agar petisyen itu dibatalkan dengan kos. Ini merupakan rayuan perayu terhadap keputusan menurut s 36A Akta Kesalahan Pilihanraya 1954 ('Akta tersebut'). Semasa perbicaraan rayuan itu responden telah menimbulkan bantahan awal terhadap rayuan ini atas alasan bahawa memandangkan keputusan yang dirayukan terhadap kes ini berkaitan dengan perkara interlokutori ia adalah muktamad dan tidak boleh dirayu. Bantahan tersebut adalah berdasarkan sandaran terutamanya pada s 33(4) Akta tersebut dan keputusan mahkamah ini dalam *Gan Joon Zin v Fong Kui Lun & Ors* [2004] 4 CLJ 729 ('kes *Gan*'). Isu utama yang perlu ditentukan dalam kes ini adalah sama ada keputusan hakim pilihan raya untuk membatalkan petisyen itu, berdasarkan bantahan awal, boleh dirayu. Perayu menegaskan bahawa mahkamah patut mempertimbangkan semula ketepatan

kes *Gan*, yang berkaitan dengan perintah pembatalan yang dibuat oleh hakim pilihan raya, kerana ia tidak mungkin niat Parlimen untuk menyekat pempetisyen daripada merayu terhadap perintah sebegini. Perayu selanjutnya menghujahkan bahawa bantahan awal dalam kes ini tidak boleh dianggap sebagai perkara interlokutori sahaja kerana ia mematahkan petisyen itu dan oleh sebab itu dia menegaskan bahawa ia tidak dihalang oleh pengecualian yang dikenakan oleh s 33(4) Akta tersebut. Responden sebaliknya menegaskan bahawa ia adalah undang-undang tetap bahawa suatu rayuan adalah alat statut dan bahawa peruntukan-peruntukan Akta tersebut hendaklah ditaksirkan dengan ketat. Oleh itu, jika Akta tersebut tidak memperuntukkan hak untuk merayu ke Mahkamah Persekutuan, seperti dalam kes ini, ianya bukan untuk mahkamah ini berbuat sebaliknya tidak kira serius mana akibatnya.

Diputuskan, menolak bantahan awal dengan kos dan memutuskan bahawa pempetisyen mempunyai hak untuk merayu di bawah s 36A Akta tersebut:

(1) Pindaan kepada s 33(4) Akta tersebut, yang berkuat kuasa pada 2 Mei 1986, menamatkan ketidakpastian yang wujud tentang sama ada suatu keputusan berhubung perkara interlokutori boleh dirayu atau tidak. Seksyen 33(4) Akta tersebut yang dipinda memperuntukkan bahawa keputusan mahkamah tentang perkara-perkara interlokutori berkaitan petisyen pilihan raya adalah muktamad. Oleh itu, sejauh mana keputusan-keputusan tentang perkara-perkara interlokutori adalah berkaitan, ia adalah tetap bahawa tidak ada hak untuk merayu (lihat perenggan 9).

(2) Berdasarkan definisi terma perintah interlokutori atau penghakiman berdasarkan ujian-ujian yang digunakan oleh mahkamah dalam menentukan sama ada perintah atau penghakiman itu adalah interlokutori atau tidak ia kelihatan dalam kes ini perintah oleh hakim pilihan raya tidak boleh dianggap sebagai perintah interlokutori kerana ia telah mematahkan petisyen itu (lihat perenggan 17–18).

(3) Walau bagaimanapun, dalam kes suatu keputusan oleh hakim pilihan raya di bawah s 36 Akta tersebut tiada rayuan dibenarkan sehingga pindaan berkuat kuasa pada 16 Januari 2003 dalam bentuk s 36A. Hak untuk merayu seperti yang diberikan oleh s 36A(1) Akta tersebut adalah terhad untuk penentuan hakim pilihan raya di bawah s 36 Akta tersebut. Oleh sebab s 36(1) Akta tersebut memerlukan keputusan oleh hakim pilihan raya dibuat di akhir perbicaraan petisyen pilihan raya, dan memandangkan petisyen dalam kes ini dibatalkan berdasarkan bantahan awal, timbul isu tentang sama ada terdapat perbicaraan petisyen pilihan raya dalam kes ini. Perkataan-perkataan 'trial of an election petition' patut diberikan maksud yang luas, iaitu, untuk

memasukkan perbicaraan apa-apa isu berkaitan petisyen itu, sama ada isu melalui bantahan awal atau tidak, dan setelah menentukan isu itu hakim pilihan raya tidak terikat untuk meneruskan isu atau isu-isu yang lain. Oleh itu, dalam kes ini hakim pilihan raya telah membenarkan bantahan awal yang ditimbulkan oleh responden di permulaan perbicaraan dan berdasarkannya telah membatalkan petisyen itu tetapi dengan berbuat demikian beliau telah membicarakan isu itu di hadapannya. Oleh itu, terdapat perbicaraan petisyen pilihan raya bagi tujuan s 36(1) Akta tersebut dan dengan memerintahkan petisyen itu dibatalkan hakim pilihan raya telah membawa petisyen pilihan raya itu ke penutupnya (lihat perenggan 10–12 & 28).

(4) Seterusnya, s 36A(1) dengan sendirinya memperuntukkan bahawa pempetisyen atau calon yang mana hak untuk dilapor dipilih atau dipilihnya telah diadukan boleh merayu terhadap penentuan hakim pilihan raya kepada Mahkamah Persekutuan, Oleh itu, jelas perintah oleh hakim pilihan raya membatalkan petisyen itu adalah penentuan dalam maksud seksyen tersebut dan justeru itu boleh dirayu (lihat perenggan 29).

(5) Kesimpulan yang dibuat oleh mahkamah ini dalam kes *Gan* membawa kepada keputusan yang janggal, di mana, apabila hakim itu membatalkan petisyen tanpa perbicaraan, tanpa mendengar keterangan, tetapi semata-mata atas prosedur yang cacat, perintah itu tidak boleh dirayu namun apabila kes itu diputuskan selepas apa yang dirujuk sebagai 'full trial', maka ia boleh dirayu. Memandangkan ini tidak mungkin menjadi niat badan perundangan, mahkamah terpaksa menyimpang daripada keputusannya dalam kes itu (lihat perenggan 30).]

Notes

For cases on application for declaration that elections were null and void, see 6 *Mallal's Digest* (4th Ed, 2007 Reissue) paras 2006–2012.

Cases referred to

Auto Dunia Sdn Bhd v Wong Sai Fatt & Ors [1995] 2 MLJ 549 (refd)

Bozson v Altrincham Urban District Council [1903] 1 KB 547 (refd)

Dason Gaban v Zulkifli bin Majun & 21 Ors Cases [1982] 1 MLJ 315 (refd)

Devan Nair v Yong Kuan Teik [1967] 1 MLJ 261 (refd)

Gan Joon Zin v Fong Kui Lun & Ors [2004] 4 CLJ 729 (not folld)

Gee Siew Yee v Ann Wam Tiang [2008] 1 MLJ 754 (refd)

Hari Vishnu Kamath, Petitioner v Election Tribunal, Jabalpur Anor, Respondents, AIR 1958 MP 168 (refd)

Haron Mohd Zaid v Central Securities (Holdings) Bhd [1982] CLJ 293; [1982] CLJ (Rep) 26 (refd)

Hong Hock Trading & Co v Carseng Manufacturing (M) Sdn Bhd [2002] MLJU 642 (refd)
Mills v Commonwealth 20075/00 [2003] NSWSC 1053 (refd)
Om Prabha Jain, Appellant v Gian Chand & Anor, Respondents, AIR 1959 SC 837 (folld)
Peninsular Land Development Sdn Bhd v K Ahmad (No 2) [1970] 1 MLJ 253 (refd)
Perting Timor Election (No 2) Re [1962] 28 MLJ 333 (refd)
PP v Utrakumaran a/l Samivel [2006] MLJU 441 (refd)
Ratnam v Cumarasamy & Anor [1962] MLJ 330 (refd)
Sajjansingh & Anor, Petitioners v Bhogilal Pandy & Anor, Non-Petitioner, AIR 1958 Raj 307 (refd)
Sarjit Singh Khaira Re [1995] 3 MLJ 112 (refd)
Tetuan J & S Holdings Sdn Bhd v A Karim Hasan & Anor [2000] 6 MLJ 739 (refd)
Wozniak v Wozniak [1953] 1 All ER 1192 (refd)

Legislation referred to

Election Offences Act 1954 ss 33(4), 36, 36(1), 36(1)(a), 36A, 36A(1)
Representation of the People Act 1951 [India] ss 90(1), 91, 98

Firoz Hussein bin Ahmad Jamaluddin (Mohd Hafanizam Harun, Cheng Mai, Shamshawal Azraai bin Ahmad, Nik Mohd Nasir bin Nik Hussin, Muhammad Rafaei bin Adnan, Julita Ilhani bt Abdul Jabbar and Syed Faisal bin Syed Abdullah with him) (Ahmad Shahabuddin & Co) for the appellant.
Wan Abd Muttalib Embong Saifuddin bin Othman (Mohd Kamaruzaman bin Abd Wahab, Zulkarnain bin Lokman, Zabidi bin Yusuf, Hj Mohd Arif, Yusuf Mohamad Hanifa, Maidin Abd Haris bin Malek, Hj Radzi bin Mustafa and Syed Zakaria bin Syed Zainal Abidin with him) (Wan Abdul Mutalib & Co) for the respondent.

Arifin Zakaria FCJ (delivering judgment of the court):

BACKGROUND FACTS

[1] The appellant (petitioner in the court below and in this judgment will also be referred to as 'the petitioner') stood as a candidate for Barisan Nasional in the recent general election, held on 8 March 2008 for the State Legislative Assembly constituency N 22, Manir, Terengganu. He lost to the Parti Islam Se Malaysia candidate, the respondent in the present appeal, by a majority of 406 votes. Dissatisfied with the said election result he filed an election petition at the High Court at Kuala Terengganu seeking the following reliefs:

(i) a declaration that the election for State Assembly Seat N 22 Manir, Terengganu, held on 8 March 2008 be declared invalid and void;

(ii) for a declaration that the respondent was not duly elected or ought not to have been returned at such election;

(iii) a determination and direction pursuant to s 36 of the Election Offences Act 1954 ('the Act');

(iv) further other reliefs as the court deems fit; and

(v) costs of the petition.

[2] At the hearing of the petition learned counsel for the respondent raised five grounds as preliminary objection. Having heard submissions of parties the learned election judge, upheld the preliminary objection and ordered that the petition be struck out with costs.

[3] This is the appeal by the petitioner against the decision of the learned election judge. We first heard the appeal on 13 June 2008. At that hearing learned counsel for the respondent, En Saifudin bin Othman, raised a preliminary objection against this appeal on the ground that, since the decision of the learned election judge appealed against in this case relates to an interlocutory matter, it therefore follows that the decision is final and not appealable. He relied primarily on the provision of s 33(4) of the Act and the decision of this court in *Gan Joon Zin v Fong Kui Lun & Ors* [2004] 4 CLJ 729 in support of his contention. In view of the seriousness of the matter at hand and the effect it may have on similar cases pending before the courts throughout the country we directed the parties to take a closer look at the relevant provisions of the Act and in the circumstances we adjourned the hearing to 19 June 2008 for further arguments.

THE ISSUES

[4] The principal issue arising from the preliminary objection is whether an appeal would lie against the decision of the learned election judge in ordering the petition to be struck out based on the preliminary objection raised by the respondent. This issue had come for consideration of this court in the case of *Gan Joon Zin* which ruled that no appeal would lie to this court in respect of interlocutory orders including orders striking out of petition which in fact finally disposes of the petition without hearing the merit.

[5] Learned counsel for the petitioner urged upon us to reconsider the correctness of that decision in so far as it relates to striking out order made by the election judge because of the consequence that flows from such an order. He contends that it could not have been the intention of Parliament to shut out the petitioner from appealing against such an order.

[6] Tuan Hj Mohd Arif, learned counsel for the respondent in his reply contends that it is trite law that an appeal is a creature of statute and the provisions of the Act must be strictly construed. If the Act does not provide for the right of appeal to this court, as in the present case, it is not for this court to do otherwise no matter how grave the consequence may be. That was in fact the view expressed in *Gan Joon Zin* by this court.

[7] We agree with the respondent that an appeal is maintainable where statute and rules of procedure provide for it. Appeal is a right created by statute and the courts cannot create or take away such a right. As was held in *Auto Dunia Sdn Bhd v Wong Sai Fatt & Ors* [1995] 2 MLJ 549, unless an aggrieved party can bring himself within the terms of the statutory provision enabling him to appeal, no appeal would lie.

[8] In the present case we have, therefore, to look at the relevant provisions of the Act to see whether a right of appeal is given to the petitioner in the circumstances of this case. This is governed by Part VII of the Act dealing with election petitions. Section 33 of the Act which comes within this Part relates to appointment of election judge and his powers. Sub section (4) of s 33 makes provision for the hearing of interlocutory matters in connection with an election petition by a High Court judge unless otherwise ordered by the Chief Judge. Therefore, other than in respect of interlocutory matters, election petition may only be dealt with by the Chief Judge or an election judge.

[9] It should be noted that s 33(4) of the Act further provides that a decision of the court in regard to interlocutory matters in connection with an election petition shall be final. The amendment to s 33(4) of the Act was introduced by Act A 640 which came into force on 2 May 1986. This put an end to the uncertainty that existed prior to the amendment, whether a decision on interlocutory matter was appealable or not. (See *Re Perting Timor Election (No 2)* [1962] MLJ 333, *Devan Nair v Yong Kuan Teik* [1967] 1 MLJ 261 (PC) and *Dason Gaban v Zulkifle bin Majun & 21 other cases* [1982] 1 MLJ 315 (FC). Therefore, in so far as decision on interlocutory matters is concerned it is settled that there is no right of appeal.

[10] On the other hand as against the determination of an election judge under s 36 of the Act no appeal is allowed until the amendment of the Act by Act A 1177 wef 16 January 2003. This is contained in s 36A of the Act which reads:

(1) The petitioner or a candidate whose return or election is complained of may appeal against the determination of an Election Judge to the Federal Court.

A (2) Every appeal under this section shall be presented within fourteen days from the date of the determination of the Election Judge under section 36 and such appeal shall be presented in accordance with the rules of court applicable to appeals to the Federal Court.

B (3) …

[11] Hence the right of appeal as conferred by s 36A(1) is limited to the determination of an election judge under s 36 of the Act. Section 36(1) provides:

C

Section 36(1) at the conclusion of the *trial of an election petition*, the Election Judge shall —

(a) determine whether the candidate whose return or election is complained of was duly returned or elected or whether the election is void; and

D

(b) pronounce such determination in open court.

E **[12]** Thus according to s 36(1) the determination under the said section can only be made by the election judge at the conclusion of the trial of an election petition. In the present case the petition was struck out by the election judge on the preliminary objection taken up by the respondent. The issue is can that be regarded as a trial of an election petition?

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[13] As we said earlier, this issue had arisen in the case of *Gan Joon Zin*. This court with the panel comprising of Siti Norma Yaakob, Abdul Hamid Mohamad and Alauddin Mohd Sheriff FCJJ (as Their Ladyship and Lordships then were) dismissed the appeal in that case on amongst other G grounds that the wording of s 36A of the Act read together with s 36 clearly shows that an appeal is only available against the determination of the issues provided in para (a) of s 36(1) of the Act at the conclusion of the trial of the petition. In the judgment of the court delivered by Abdul Hamid Mohamad FCJ, it is said that the word 'trial' in s 36(1) can only be interpreted to mean H a full trial and the determination of the issues to mean a judgment or decision given after having considered the evidence adduced and the relevant law. The said provision, the court ruled, cannot and should not be stretched to include an order made purely on procedural grounds, on a preliminary objection before the trial begins even though it disposes of the petition.

I

[14] Learned counsel for the petitioner urged upon us to revisit the issue on the premise that the preliminary objection as in the present case could not be regarded as a mere interlocutory matter as it disposed of the petition. For that reason he contends it is not caught by the bar imposed by s 33(4) of the Act.

[15] At this juncture it may be appropriate to consider what is meant by interlocutory matter in the context of s 33(4) of the Act. The *Oxford English Dictionary* 2nd Ed Vol XVII states, 'interlocutory' in law means pronounced during the course of an action; not finally decisive of a case or suit; especially in interlocutory decree, judgment and order. Also relating to a provisional decision in a case.

Halsbury's Laws of England (4th Ed) at para 506 defines the word 'interlocutory' to mean:

> An order which does not deal with the final rights of the parties, but either (1) is made before judgment, and gives no final decision on the matters in dispute, but is merely on a matter of procedure, or (2) is made after judgment, and merely directs how the declarations of right already given in the final judgment are to be worked out, is termed 'interlocutory'.
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> An interlocutory order, even though not conclusive of the main dispute, may be conclusive as to the subordinate matter with which it deals.
>
> The phrase 'interlocutory judgment' is also used to describe a judgment for damages to be assessed.'

[16] In *Bozson v Altrincham Urban District Council* [1903] 1 KB 547 Lord Alverston CJ, sitting in Court of Appeal, put the test, which later became known as the *Bozson* test in the following words:

> It seems to me that the real test for determining this question ought to be this: Does the judgment or order, as made, finally dispose of the rights of the parties? If it does, then I think it ought to be treated as a final order; but if it does not, it is then, in my opinion, an interlocutory order.

[17] This test had been applied by our courts and to name a few, see: *Ratnam v Cumarasamy & Anor* [1962] 28 MLJ 330; the Federal Court in *Peninsular Land Development Sdn Bhd v K Ahmad (No 2)* [1970] 1 MLJ 253; the PC in *Haron Mohd Zaid v Central Securities (Holdings) Bhd* [1982] CLJ 293; [1982] CLJ (Rep) 26. As correctly stated by Md Raus Shariff JCA in the Court of Appeal in *Gee Siew Yee v Ann Wam Tiang* [2008] 1 MLJ 754 at p 760, in line with the above authorities:

> It is our respectful view that the consent order is in the nature of an interlocutory order as it does not finally determine the dispute between the parties in respect of the subject matter in the suit.

[18] Based on the above, we are of the considered opinion that the order made by the learned election judge in the present case could not be regarded as an interlocutory order as it disposes of the petition.

[19] However, our reading of the judgment of this court in *Gan Joon Zin* is that, it did not at all rule that the preliminary objection in that case is an interlocutory matter and as such caught by the bar under s 33(4) of the Act. On the contrary it proceeded on the assumption that it is not, otherwise it would not have been necessary for the court to go on to consider s 36 of the Act and ruled that the determination of the petition based on the preliminary objection raised at the outset of the hearing of the petition, does not come within the ambit of the term 'trial of an election petition'. This is what it said:

> The provision cannot and should not be stretched to mean an order made purely on procedural grounds on a preliminary objection before the trial even begins, eventhough it disposes of the petition.

[20] The petitioner contends that this ruling of this court is contrary to the statutory provision itself which speaks of 'trial' rather than 'full trial' as stated by this court. Learned counsel for the petitioner respectfully submits that the court should not have read into the statute the words 'full trial' when the statute only uses the word 'trial.'

[21] At this juncture it is pertinent to consider what is meant by the word 'trial' as found in s 36. *The Pocket Oxford Dictionary* (8th Ed), defines the word 'trial' to mean, inter alia — 'judicial examination and determination of issues between parties by a judge with or without a jury.

[22] Lord Denning in *Wozniak v Wozniak* [1953] 1 All ER 1192 associates the word 'trial' with final determination of the matter. In *Mills v Commonwealth 20075/00* [2003] NSWSC 1053 Shaw J adopted the meaning of the word 'trial' in *Wozniak v Wozniak*, when he said it contemplates a final determination as distinct from a preliminary application. This was followed in the local jurisdiction in the following cases: *Hong Hock Trading & Co v Carseng Manufacturing (M) Sdn Bhd* [2002] MLJU 642; *PP v Utrakumaran a/l Samivel* [2006] MLJU 441; *Re Sarjit Singh Khaira* [1995] 3 MLJ 112; *Tetuan J & S Holdings Sdn Bhd v A Karim Hasan & Anor* [2000] 6 MLJ 739.

[23] In the Indian case of *Sajjansingh & Anor, Petitioners v Bhogilal Pandya & Anor, Non-Petitioner* AIR 1958 Raj 307, IN Modi J speaking of the word 'trial' said:

> Now it is indeed difficult to define the term 'trial' precisely; as a definition given for the purposes of one context may not be found to be satisfactory for another. Broadly speaking, however, a trial is the examination by a competent court of the facts or law in dispute or put in issue in a case. It is the judicial examination of issues between parties whether they are of law or of fact.

[24] In *Hari Vishnu Kamath Petitioner v Election Tribunal, Jabalpur and another, Respondents* AIR 1958 MP 168 at p 173, the court expressed the opinion that, 'The word 'trial' undoubtedly has two meanings. It may mean the trial of a controversy that arises from an issue. It may equally mean the trial of an election petition or a complain or an action from beginning to end. In our opinion, the word used in s 90(1) of the Act means the latter. In this sense, which has been approved by Their Lordships of the Supreme Court, the word 'trial' covers the entire process of litigation from the acceptance of the election petition for trial to its disposal. [The 'Act' here refers to the Representation of the People Act (1951).]

[25] More directly on point would be the decision of the Indian Supreme Court in *Om Prabha Jain, Appellant v Gian Chand & Anor, Respondents,* AIR 1959 Supreme Court, 837. In that case s 98 of the Representation of the People Act 1951 came for consideration of the court, which, inter alia, provides:

> Section 98 Decision of the Tribunal
>
> *At the conclusion of the trial of an election petition the Tribunal shall make an order*:
>
> (a) dismissing the election petition; or
>
> (b) declaring the election of all or any of the returned candidates to be void; or
>
> (c) declaring the election of all or any of the returned candidates to be void and the petitioner or any other candidate to have been duly elected; (Emphasis added.)

[26] Construing this section Sarkar J delivering judgment of the court at p 839 said:

> Therefore it would seem that the sole duty of an election tribunal is to try an election petition referred to it. It is an ad hoc body created under s 86 for this purpose only. When it passes an order which closes the proceedings before it arising out of an election petition, it must be deemed to have tried the petition and passed the order at the conclusion of such trial. It would no less be so when it decides a matter before it and thereby brings the proceedings to a close on one of the several issues raised and does not decide the other issues. In such a case it has made the order after trial of that issue for clearly it cannot make an order on any issue without trying it. It has therefore made the order at the conclusion of the trial held by it. And for his purpose, it makes no difference that the issue tried is of the nature usually called as preliminary issue or that the tribunal does not consider it necessary to try the remaining issues.

[27] And at p 840 it said further:

> There is no reason why the Act should provide that a dismissal of an election petition on the merit as it has been called, shall be dealt with by the Act in one way while a dismissal on a preliminary point shall be dealt with differently when the practical result of both kinds of dismissal is the same. We are unable to think that the Act could have intended such a curious result.

[28] As may be noted, s 98 of the Indian Representation of the People Act employs similar wording as our s 36(1) of the Act. In the circumstances we are inclined to the view expressed in *Om Prabha Jain* in that the words 'trial of an election petition' ought to be given a broad meaning that is, trial of any issue relating to the petition, be it by way of a preliminary issue, and having determined the said issue, the election judge is not bound to proceed to hear the remaining issue or issues. As in the instant case the election judge had allowed the preliminary objection taken up by the respondent at the outset of the hearing and on that basis the petition was struck out. That, in our opinion, is a trial of the election petition filed by the petitioner, as it cannot be denied that the election judge had, in so doing, tried the issue before him. And by ordering that the petition by strike out the election judge had brought the election petition to its conclusion. In the circumstances we hold that s 36 of the Act would apply. And by the same token the election judge ought to have:

(a) made a determination whether the candidate whose return or election is complained of was duly returned or elected or whether the election is void; and

(b) pronounced such determination in open court.

[29] Apart from what we have said above, further support for our view may be found in s 36A(1) itself, which provides that a petitioner or a candidate whose return or election is complained of may appeal against the determination of an election judge to the Federal Court. Clearly the order by the election judge striking out the petition is a determination within the meaning of the said section and hence it is appealable.

[30] Further as noted by this court in *Gan Joon Zin* the conclusion reached by this court in that case could lead to an anomalous result in that, when a judge strikes out a petition without a trial, without hearing evidence, but purely a procedural defect, the order is not appealable, but when a case is decided after, what is commonly referred to as 'a full trial' then it is appealable. Indeed, we agree that the interpretation given by this court in *Gan Joon Zin* could lead to such curious result. We do not think that that could have been the intention of the Legislature. For the reasons given above,

we are, therefore, constrained to depart from the earlier decision of this court in *Gan Joon Zin.*

THE RESULT

[31] In the result we hold that the petitioner has a right of appeal under s 36A of the Act and with that the preliminary objection of the respondent is hereby dismissed with costs.

Preliminary objection dismissed with costs.

Reported by K Nesan